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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 ALEX ANG and LYNNE STREIT,
12 individually and on behalf of all others
similarly situated,

13 Plaintiffs,

v.

14 BIMBO BAKERIES USA, INC.,

15 Defendant.

Case No. 13 Civ. 1196 (WHO) (NC)

**STATEMENT REGARDING DISCOVERY
DISPUTES**

Judge: Hon. Nathanael M. Cousins

Hearing: April 16, 2014 at 2:00 p.m.

Courtroom: A, 15th Floor

17 Plaintiffs Alex Ang and Lynne Streit (“Plaintiffs”) respectfully submit this statement in
accordance with the Court’s Order dated March 19, 2014 (Dkt. # 61). Defendant Bimbo Bakeries
18 USA, Inc. (“Defendant”), however, takes the position that the scope of Court’s Order does not
19 include disputes relating to Defendant’s responses to Plaintiffs’ discovery requests. Because the
20 parties have resolved all disputes relating to Plaintiffs’ responses to Defendant’s discovery
21 requests, Defendant filed a “Notice of Resolution of Discovery Dispute” (Dkt. # 63) purporting to
22 advise the Court that the parties have resolved all disputes subject to the Court’s Order. Plaintiffs
23 disagree with Defendant’s position.

24 Defendant believes that it is not required to submit a joint statement with Plaintiffs in
accordance with the Court’s Order or the Court’s Civil Standing Order. However, in an
25 abundance of caution, Plaintiffs now submit their portion of the joint statement in order to comply
abundance of caution, Plaintiffs now submit their portion of the joint statement in order to comply
26 with the Court’s Order and Civil Standing Order.

1 This class action alleges that Defendant unlawfully manufactured, distributed, and sold
 2 specific misbranded and illegal food products in violation of the Food, Drug, and Cosmetic Act,
 3 FDA regulations, and California's Sherman Law.¹ On January 24, 2014, Plaintiffs served sets of
 4 document requests (Exhibit A) and interrogatories (Exhibit B). Responses to those demands were
 5 served on March 7, 2014 (Exhibits C and D). On March 8, 2014, Plaintiffs sent a detailed letter
 6 raising numerous issues regarding those responses, as well as Defendant's refusal to serve initial
 7 disclosures. Defendants did not respond to that letter. After multiple requests to meet and confer,
 8 the parties did so on March 26, 2014. However, the attorney representing Defendant was not
 9 authorized to take any position or bind Defendant with respect to any discovery issue. Therefore,
 10 the parties remain in the same places as they were when Plaintiffs first brought these issues to the
 11 Court's attention (Dkt. # 57).

12 In accordance with the Court's Order dated March 19, 2014 (Dkt. # 61), after the parties met
 13 and conferred, on March 31, 2014, Plaintiffs sent their portion of a joint statement to Defendant
 14 so that Defendant could draft its portion of the statement. Defendant subsequently advised that it
 15 believes it is not required to submit a joint statement at this time. The following discovery issues
 16 remain unresolved.

17 **Initial disclosures:** Despite its many discovery requests to Plaintiffs, Defendant refuses to
 18 make initial disclosures in violation of Rule 26(a). This is not an optional requirement.

19 **The proper parties in interest:** Defendant has asserted that it is not the correct party in
 20 interest with respect to one or more of Plaintiffs' claims. *See* Dkt. # 21 at 1n.1. Yet, it refuses to
 21 identify any of the supposed real parties in interest or answer interrogatories seeking the identity
 22 of those parties.² Defendant has also failed to file a Certification of Interested Entities or Persons
 23 pursuant to Civil Local Rule 3-16. It must disclose this information or waive this defense.

24 ¹ *See* Second Amended Complaint ("SAC") (Dkt. # 40). Judge Orrick has twice found the
 25 bulk of Plaintiffs' claims to be sufficiently pled. *See* Dkt. ## 38 and 58. Of all the products at
 26 issue identified in the SAC (Dkt. # 40 at ¶¶ 50-51, 194, 198, 203, 226), only claims relating to
 27 certain Entenmann's products (Dkt. # 40 at ¶ 215) have been dismissed. *See* Dkt. # 58 at 17-18.

28 ² *See* Interrogatory Responses ("Int. Resp.") ## 5-6 (listing parties in interest as "BBUSA and
 various [unidentified] co-packers"). Any manufacturers or distributors of the products at issue
 would be the interested parties. *See* Cal. Health & Safety Code § 110760 ("It is unlawful for any
 person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded.").

1 **Limits on periods in which documents are created:** In response to many document
 2 demands, Defendant will only produce documents created within the four-year class period.³
 3 Defendant is alleged to have engaged in a fraudulent scheme to deceive consumers as to the
 4 quality and healthiness of its products by placing specific prohibited terms, marks, or
 5 representations on its products. This scheme began before the class period (which is limited to
 6 four years by virtue of applicable limitations periods). Therefore, relevant documents relating to,
 7 *inter alia*, Defendant's intent, motive, and knowledge would predate the class period. As
 8 examples, pre-class period documents relating to Defendant's engagement in the specific
 9 unlawful labeling practices at issue are clearly relevant; as are documents drafted at any time
 10 relating to why the product labels at issue contain the unlawful terms, marks, and representations.

11 **Limiting of production to information relating to some, but not all products at issue:**
 12 Judge Orrick has expressly ruled that specific products purchased and not purchased by Plaintiffs
 13 remain at issue in this action. Dkt. ## 38, 58. Most document and interrogatory responses,
 14 however, limit production to information relating to a subset of those products.⁴ That limitation is
 15 improper. Further, Defendant now suggests that, as a matter of law, Plaintiffs may not assert
 16 surviving claims regarding certain products, however, Judge Orrick has ruled to the contrary. *Id.*

17 Relatedly, Defendants refuse to produce key relevant documents related to their unlawful
 18 labelling practices unless they relate to specific products. For example, the SAC alleges that it is
 19 unlawful to label products as "100% Whole Wheat" when they are not. Documents relating to the
 20 general use of this phrase on products that are less than 100% whole wheat are relevant and must
 21 be produced, even if such documents do not specifically relate to a product at issue.

22 **Sales information:** In order to both calculate damages of the class, and to demonstrate that
 23 Defendant was able to charge higher prices or increase sales when the unlawful terms or marks

24
 25 ³ See Document Responses ("Doc. Resp.") ## 3, 4, 6-11, 13-22, 24, 32-39, 50-51, 53-55, 64-
 26 69 (all seeking documents not limited to the class period). Defendant also improperly limits the
 27 scope of interrogatory responses to information from the class period. See Int. Resp. ## 3-5. For
 28 example, Defendant will only provide relevant information relating to services provided by
 marketing or advertising agencies during the class period, but not other periods. Int. Resp. # 3.
 Moreover, Defendant asserts the same boilerplate objections to almost every document request.

⁴ See Doc. Resp. ## 4, 6-11, 13, 17-22, 24, 32-39, 50-51, 53-55, 57, 64-69; Int. Resp. ## 1-5.

were added to product labels (*i.e.*, Defendant's motive and intent), Plaintiffs require specific information relating to sales, pricing, and revenue. Defendant refuses to produce any such information, asserting that it is privileged or that these requests are "premature." *See Doc. Resp. ## 26-31, 73.* Similarly, Defendant also claims privilege when refusing to produce documents relating to differences between prices of products containing the specific unlawful terms or marks at issue and prices of products without them. *See Doc. Resp. ## 58-63.* All these categories of information are neither privileged nor "premature." *See Brazil v. Dole Packaged Foods, LLC, No. C12-01831 LHK (HRL), Slip. Op. at 2 (N.D. Cal. Apr. 1, 2014) (Dkt. #123)* (compelling production of the same type of sales information).⁵

Identification of witnesses, compliance information, and communications with consultants: In response to interrogatories seeking the identification of persons responsible for Defendant's compliance with labeling requirements or for the text appearing on Defendant's products, Defendant identifies a total of two persons. Int. Resp. ## 1-2. At the largest bread manufacturer in the country, there are likely more than two such persons. Defendant also improperly refuses to produce documents regarding its compliance with labeling requirements specifically relating to the products at issue. Doc. Resp. # 5. Further, Defendant also withholds as privileged, all communications with consultants or specialists relating to the food labeling practices at issue. Doc. Resp. ## 40-46. Such communications are not privileged.⁶

Documents regarding "Toasted Bread": In defense of allegations that Bimbo Original Toasted Bread violates FDA regulations relating to the manufacture of bread, Defendant asserts that "Toasted Bread" is not bread, and is therefore not subject to those regulations. Dkt. # 21 at 8-11. Nevertheless, Defendant asserts that all documents relevant to this defense are privileged. Doc. Resp. # 23. Any documents relating to the factual basis for Defendant's position that "Toasted Bread" is not bread are not privileged.

⁵ To the extent Defendant is concerned about the release of proprietary information, Plaintiffs have offered to enter into a protective order.

⁶ Indeed, in interrogatory responses, Defendant identifies some of these consultants and specialists who are not attorneys. *See Int. Resp. # 3.*

1 Dated: April 2, 2014

Respectfully submitted

2 /s/ Ben F. Pierce Gore

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